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Filed : March 26, 2004

## REMARKS

The specification has been amended to address the suggestions provided by the Examiner.

### Regarding the Claim Rejections under 35 USC § 102

The Examiner rejected claim 1 under 35 USC §102(b) as being allegedly anticipated by the Australian Plant Breeders' Rights Application 1998018 and grant no. 1983. The Examiner states that the PBR application and grant both indicate that the variety was sold in 1998. The Examiner also alleges that Claim 1 has been anticipated by the Queensland Country Hour Summary published December 2, 2002 and in view of AU PBR 1983. Also, the Examiner alleges that Claim 1 is anticipated by the Queensland Government announcement of Dr Tony Whiley's retirement in view of AU PBR 1983.

In response to the Examiner's allegations, Applicants submit that in regards to budwood distribution, 'B74' propagation material has never been publicly released. Secure scientific non-commercial testing of the variety in environments outside of Childers was undertaken to establish the variety's adaptability. Fruit from the Childers site was first sold in February 1998 but since the variety is monoembryonic, the seeds of these fruit cannot be used to propagate the variety. Vegetative propagation such as grafting using budwood is the only form of propagation that will replicate the variety. The variety owners entered into an exclusive commercial agreement with a company now called 'OneHarvest' on November 29, 1999 to manage the commercialization of the variety. 'OneHarvest' have never publicly released the variety. 'OneHarvest' sub-licenses selected growers to grow the variety securely by making budwood exclusively available to these growers for propagation. To the best of the Applicants' knowledge, the budwood has never been sold or otherwise made available to the public. The first grower sub-license was executed on November 1, 2000 and was with Tengarra Farms Pty Ltd.

Regarding the interpretation of section 102 as applied to novelty rejections of plant patents, Applicants respectfully assert that a paper publication describing the plant cannot, by itself, put a living plant variety into the hands of the public. Thus, a publication cannot, alone, destroy the novelty of the plant variety. A person reading the publication would not be able to obtain the invention without also having the propagating material of the plant. The sale of the mango fruit alone would not put the plant variety into the hands of the public, because planting

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the seed from the fruit would not produce the same plant variety as the claimed invention. Thus, without also having the budwood or other propagating material, one of skill in the art would not be able to duplicate the claimed plant variety. Accordingly, because the Applicants have never sold or distributed the budwood, Applicants respectfully submit that the rejection under 35 USC § 102(b) be withdrawn.

**Regarding the Claim Rejections under 37 CFR § 1.163 and 35 USC § 112**

The Examiner objected to the disclosure under 37 CFR § 1.163 and 35 USC § 112 first and second paragraphs, as not being supported by a clear and complete botanical description of the plant for reasons set forth in the Office Action. The Office Action listed the objections to the disclosure separately in paragraphs A through DD. The objections corresponding to paragraphs A, D-R, and T through DD have been fully addressed by the amendments to the specification, and are self-evident in the marked-up copy showing the amendments.

Regarding paragraph B, the Examiner stated that the photographs in Figure 1 are arranged vertically and therefore it is not clear as to which variety is ‘Kensington Pride’ or ‘R2E2.’ Applicants respectfully submit that the photographs in Figure 1 are not arranged vertically, but rather that the bottom of each of the three mangoes photographed appears on the right-hand long edge of the page and are therefore arranged horizontally fitting the ‘left’ and ‘right’ references made in the description in the specification of FIG. 1. Accordingly, withdrawal of the rejection is respectfully requested.

Regarding paragraph C, the Examiner requested that the applicant disclose whether the parent root stock and/or comparison cultivars ‘Sensation’, ‘Kensington Pride’, ‘R2E2’ and ‘Keitt’ have been patented in the US or are the subject of patent applications. Applicants submit that the varieties used as comparison cultivars are public varieties (unprotected) in Australia and those available in the United States are not patented or subject to patent applications.

Regarding paragraph K, the Examiner requested information regarding the fruit maturity. As is now noted in the substitute specification, fruit maturity of ‘B74’ is reached after the accumulation of 1650 degree days (measured by the number of °C hours accumulated above 10°C starting from the point of full inflorescence extension). At the site where the description for ‘B74’ was developed fruit reach the mature green stage during the first week of February

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(midseason). In contrast, fruit of 'Kensington Pride' reach green maturity in the second week of January (early season) while 'Sensation' fruit reach green maturity in the first week of March (late season).

Regarding paragraph L, the Examiner requested clarification regarding the rootstock. 'Kensington Pride' is the main mango variety grown in Australia. Its seed type is polyembryonic producing 2-5 nucellar seedlings from each seed. Due to the genetic uniformity of these seedlings they are most commonly used as rootstock material when propagating new orchard trees. The experimental plot used to compile the description of 'B74' was an older orchard (6 years since establishment) that was first planted with 'Keitt' trees grafted to 'Kensington Pride' seedling rootstocks. To establish 'B74' and the other comparators in this orchard the 'Keitt' trees were cut back to approximately 1 m above the graft union with the 'Kensington Pride' rootstock and then bark-grafted with the scion wood of 'B74.'

Regarding paragraph M, the Examiner requested clarification regarding the trunk of the tree. Applicants respectfully submit that because the top-worked trees used for the original description for Plant Breeders Rights in Australia did not have 'B74' trunks, the trunk data now added to the substitute specification has been collected from another block of 10-year-old 'B74' trees in the same orchard where 'B74' was grafted directly to seedling 'Kensington Pride' rootstocks. The position where the diameter was measured is above the graft union.

Regarding paragraph S, the Examiner requested clarification regarding the percentage of bunch bearing inflorescences. With respect to fruiting characteristics, mangoes can be grouped into two types according to the numbers of fruit carried and matured on each inflorescence. For example 'Kensington Pride' and 'R2E2' are referred to as solo-bearing as the majority of the crop is carried as single fruit per inflorescence. Alternatively, 'B74' and its maternal parent 'Sensation' are bunch-bearing carrying multiple fruits per inflorescence. Typically 'B74' carries a mean number of 3.2 fruit per inflorescence through to maturity at the Childers site. This number declines to 2.4 fruit per inflorescence when the variety is grown in the monsoonal tropics of northern Australia. This information has been added to the specification.

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### CONCLUSION

This Amendment addresses each issue raised in the Office Action, and Applicant respectfully submits that the application is now in condition for allowance, which action is earnestly solicited. A marked-up version of the specification as now amended, with underlines to indicate additions and strikethroughs to indicate deletions, is enclosed herein. Additionally, a clean copy of the specification, as now amended, is enclosed. If there remain any obstacles to prompt allowance, the Examiner is invited to call the undersigned.

Please charge any additional fees, including any fees for additional extension of time, or credit overpayment to Deposit Account No. 11-1410.

Respectfully submitted,

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